BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF KARL S. KARLSSON, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 1004 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of respondent's order denying a request for an increase in authorized acreage under a ground water permit, came on regularly for hearing in Spokane, Washington, on July 22, 1976. Appellant Karl S. Karlsson was represented by Clinton J. Merritt, Jr.; Assistant Attorney General Laura E. Eckert appeared for respondent Department of Ecology; Ellen D. Peterson, hearing examiner, presided.

Having heard the testimony, having examined the exhibits, having issued a proposed Order, having considered exceptions to such proposed Order received from respondent, said exceptions being granted in part

and denied in part, the Pollution Control Hearings Board makes the following

FINDINGS OF FACT

I

On January 3, 1972, appellant Karlsson, through his attorneys Milne & Peterson, submitted a request for public ground water for the irrigation of 680 acres within the Quincy Subarea. Such acreage included three separately identified parcels, one parcel being the 320 acres at issue in this appeal. The request was held for priority purposes pending the adoption of management regulations for the Quincy Subarea. Regulations instituting a permit program for artificially stored ground water in the Subarea were adopted on January 8, 1975.

On February 8, 1975, an application for artificially stored ground water (No. 12365) was filed with the Department of Ecology (DOE) by Mr. Karlsson, again through his attorneys, now Milne & Merritt. This application requested water in the amount of 6,500 gallons per minute, six acre-feet per year, for the irrigation of 208 acres. The "Legal Description of Property on Which Water is to be Used" is therein described as the "North 1/2 of Section 26, Township 18 North, Range 26 East of the Willamette Meridian, Grant County, Washington," a land area comprising 320 acres. In response to the permit question as to type of system proposed to be utilized, the applicant indicated "Circle Irrigation."

On March 17, 1975, a permit was issued to Mr. Karlsson for waters in the amount of "6,500 gallons per minute, 728 acre-feet per year, from March 1 to October 31, each year, for the irrigation of 208 acres."

Withdrawal was to be from two separate wells located within the North 1/2 of Section 26. Although dated March 17, 1975, the permit was issued by the DOE on or shortly after April 8, 1976.

II

On February 26, 1976, Mr. Karlsson, through his attorneys, Milne & Merritt, requested an increase in the acreage authorized to be irrigated under the permit from 208 acres to 320 acres. Prior to such date, appellant made no request of DOE for alteration or correction of the permit terms and conditions.

The bases for the request for additional acreage recited in the letter of February 26, were:

a. Mr. Karlsson had little time to carefully complete the application filed in February, 1975, prior to the deadline for its submission, as his change of address delayed receipt of the form.

b. The filling in of the "208" acre figure, rather than the 320 acre figure now requested, was "inadvertent."

c. There was and is no "logical reason" for the particular figure of 208.

d. Irrigation sprinklers placed on the property will irrigate 250 to 270 acres.

e. The mistake was discovered when Mr. Karlsson reviewed the permit document with a potential buyer.

III

On March 17, 1976, a letter was sent from Bruce Cameron, an Assistant Director of the DOE, to Mr. Merritt regarding the request for additional acreage. Mr. Cameron informed the applicant that it was the

determination and order of the Technical Committee that "upon the complete review of the circumstances" no increase in the authorized acreage could be granted administratively. From such determination and order, appellant timely appealed on March 31, 1976.

IV

There is no dispute that the use of the number "208" by the appellant in his application dated February 8, 1975, was inexplicable error on the part of appellant. In this appeal, appellant asserts no negligence on the part of the DOE in its acceptance or processing of the application as written or in its subsequent authorization of 208 irrigated acres as specifically requested by the applicant. Respondent, on its part, does not question the good faith of the appellant; i.e., the request is regarded by the DOE as an attempt to reform a term of the permit which resulted from a unilateral mistake. It is not seen as an expression of a desire formed subsequent to the issuance of the permit to acquire additional irrigated acreage.

V

It was the testimony of a DOE employee, Mr. James Lyerla, that the 208 acres authorized under the permit is too much acreage for one circle sprinkler to cover and too little for the employment of two circle sprinklers as such sprinklers normally cover 120 to 140 acres. It was Mr. Lyerla's uncontroverted testimony that a discrepancy in an application between the number of acres requested for irrigation and the acreage contained in the legal description is not uncommon, and usually results where portions of the parcel are not irrigable.[1]

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1. No testimony was offered by DOE that it had determined what acres were irrigable as required under RCW 90.03.290.

It was additionally the opinion of Mr. Lyerla that the Technical Review Committee would not respond positively to a request for the additional 112 acres through the normal permit process.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

There is no legal basis for the reformation by the Pollution Control Hearings Board of the terms of a validly issued ground water permit. If any relief is to be granted by the Board in this case, such relief must lie in equity. That statute granting jurisdiction to the Pollution Control Hearings Board for appeals from orders of the DOE (RCW 43.21B.110) is broadly and vaguely drawn and can be read to give the Board the authority to apply equitable considerations to its review of agency actions.

II

While it is helpful to the Board to consider equitable principles which have been developed in the field of contract law, reliance on these principles cannot be absolute. Public purposes underlying the statutory directives governing the issuance of ground water permits[2]

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2. RCW 90.44 - Regulation of Public Ground Water.

are significantly different than those public policies which affect equities among traditional contract bargaining parties. For example, as a unilateral rather than a mutual mistake is involved, rescission of the "transaction," rather than reformation of its terms would be the relief available if contractural principles were to govern this matter.[3]

Reformation rather than rescission is sought by appellant in this appeal, and the Board must "do equity" in terms of the facts of this case and the policies expressed and inherent in RCW 90.44.

III

In balancing the equitable considerations before it, the Board notes in the appellant's favor that:

1. The legal description of the property on which the water is to be used is in fact 320 rather than 208 acres.

2. There, indeed, seems to be no "logical" reason for the request of 208 acres particularly when it appears to be common knowledge that utilizing circle irrigation suggests acreage of 120-140 or its multiple.

3. DOE apparently did not hesitate to revise other figures specified on the application; e.g., the applicant clearly stated "6" as the maximum acre-feet per year requested yet the permit granted "728" acre-feet per year.

4. If justified, equitable relief need not establish an undesirable

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3. See, e.g., Murray on Contracts, ch. 4, Sec. 129, Computation Errors, p. 267: " . . . if the mistake in computation did not amount to willful or gross negligence and the materiality and notice are present, the modern view clearly permits relief (rescission) in such cases."

precedent for the arbitrary administrative reform of validly issued permits.

IV

Equitable considerations supportive of the Department's denial of the request include:

1. The mistake was a unilateral mistake which resulted from the appellant's own carelessness.

2. The request for 208 acres was not ambiguous on either the application or the permit as issued but was clearly stated.

3. Mr. Karlsson at all times relevant to these proceedings was represented by counsel.

4. The error was not detected and respondent was not given notice of the mistake until almost one year after the issuance of the permit.

5. Increasing acreage, even when the acre-feet per year figure remains constant, is an enlargement of the right to use water.

6. Change in the physical water use which could result from increased acreage, i.e, increased evaporation or changed drainage patterns, would impair certainty in resource allocation.

7. Reformation of permits through administrative modification rather than as a result of the normal permit process should be kept to a minimum to discourage abuses and to encourage stability of the permit process.

V

On balance the Board concludes that the specific facts of this case, judged in terms of the policies of RCW 90.44, do not warrant the granting of equitable relief.

VI

Nothing contained in this Order shall be read to preclude appellant from seeking, through the normal permit process, an increase in the number of acres to be irrigated. Nor shall the contents of this Order in any way prejudice the processing of such application.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

ORDER

The action of the respondent DOE denying appellant's request for additional irrigated acreage is affirmed.

DATED this 14th day of December, 1976.

POLLUTION CONTROL HEARINGS BOARD

See concurring opinion
ART BROWN, Chairman

See concurring opinion
W. A. GISSBERG, Member

Chris Smith
CHRIS SMITH, Member

Gissberg, W. A.--I concur. The foregoing recognizes that under the facts of this case equity is not on the side of the appellant. I would add that the principles of the law of equity alone should preclude reformation of a governmental permit for water right. Particularly is this so where the effect is to expand a water right and thus intrude upon the priority system established in this state for the allocation of water.

W. A. GISSBERG, Member

Brown, Art--I concur in the result. While it is apparent that equity is not on the side of the appellant in this case, it is equally apparent that had DOE processed the request in the manner specified in RCW 90.03.290, it is highly unlikely that this case would ever have come before this Board. The language of the statute cited above is precise in requiring that DOE ". . . shall investigate, determine and find what lands are capable of irrigation . . . ." The only evidence relating to this aspect of the case was Mr. James Lyerla's testimony that a difference between the number of acres requested for irrigation and the acreage contained in the legal description is not uncommon. This testimony doesn't even suggest compliance with RCW 90.03.290. As long as the statute is valid, the public has a right to expect compliance by DOE.

Art Brown

ART BROWN, Chairman